No. 86-100

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

In The

Supreme Court of the United States

October Term, 1986

WILLIAM T. SMITH, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court violated Rule 30 of the Federal Rules of Criminal Procedure where, having first instructed the jury as agreed in the charge conference, that they must find a single conspiracy and a single mail fraud scheme to convict petitioner on the conspiracy and substantive counts of the indictment, it later reversed this instruction in a supplemental charge, and endorsed a new theory of liability wholly at odds with the assumptions of counsel in their closing speeches and allowing conviction on a finding of participation in any one of three schemes or conspiracies.

2. Whether petitioner was denied his constitutional right to a unanimous jury verdict where the trial court authorized an eleven person verdict, over petitioner's objection, following the disability of one juror after three days of deliberation pursuant to Rule 23(b) of the Federal Rules of Criminal Procedure.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Third Circuit whose opinion is sought to be reviewed are as follows:

United States of America, appellee;

William T. Smith, Jr., appellant and

Alan R. Stoneman, appellant.

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No.

In The

Supreme Court of the United States

October Term, 1986

WILLIAM T. SMITH, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, William T. Smith, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed his judgment of conviction entered upon a jury verdict of guilty.

ADOPTION AND JOINDER IN OTHER PETITIONS FILED

Pursuant to Supreme Court Rule 19.4, the petitioner, William T. Smith, Jr., respectfully adopts and joins in the petition for writ of certiorari filed by co-petitioner, Alan R. Stoneman.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Third Circuit is reported at 789 F. 2d 196, and also appears as Appendix A to this petition. The opinion of the United States District Court for the Middle District of Pennsylvania is reported at 619 F. Supp. 1441, and also appears as Appendix B to this petition.

STATEMENT OF JURISDICTION

The petitioner, William T. Smith, Jr., seeks a writ of certiorari to review the judgment (Appendix C) rendered in accordance with an opinion (Appendix A) of the United States Court of Appeals for the Third Circuit on April 28, 1986. The judgment affirmed petitioner's criminal conviction entered in the United States District Court for the Middle District of Pennsylvania following a jury trial.

A petition for rehearing and suggestion for rehearing en banc was denied by the Third Circuit Court of Appeals (Appendix D) on May 23, 1986.

The Supreme Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT VI-JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by

an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FEDERAL RULE OF CRIMINAL PROCEDURE 23
TRIAL BY JURY OR BY THE COURT

(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially.

Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

FEDERAL RULE OF CRIMINAL PROCEDURE 30 INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

STATEMENT OF THE CASE

Petitioner was charged, together with two corporate and four other individual defendants, in a sixteen count indictment with conspiracy, 18 U.S.C. § 371, mail fraud, 18 U.S.C. § 1341, and Interstate Transportation and Aid of Racketeering 18 U.S.C § 1952(a)(3). The indictment outlined a single conspiracy involving 51 overt acts and seven mail fraud violations, and nine Travel Act violations. The conspiracy count alleged that the defendant

sought to obtain Federal Insurance Contribution Act (FICA) overpayment recovery contracts from various state and local entities by bribing public officials with cash, stock, stock options, campaign contributions, employment and paid travel. Under the theory advanced by the government at trial, petitioner participated in a single massive scheme to obtain these FICA overpayment recovery contracts from Allegheny County, Pennsylvania, the City of Pittsburgh, and the state of Pennsylvania for its school employees.

The government's consistent position was that it had proved a single, massive conspiracy and mail fraud scheme. It equated the scheme with the conspiracy. The conspiracy count of the indictment was drafted as a conspiracy to commit the single mail fraud scheme and each substantive count of the indictment incorporated by reference all of the charging language of the conspiracy-scheme count. The government consistently asserted that its proof was consistent with these allegations.

The defense consistently contended, on the other hand, that three distinct schemes were carried out by conspiratorial groups with overlapping personnel all including the government's primary witnesses John Torquato and Judy Ellis as well as David Herbert, a state social security official but involving separate corrupted officials of each governmental entity with whom they sought a contract; namely, the City of Pittsburgh, Allegheny County and the Office of the State Treasurer. Because of the government's position with respect to having proved a single scheme-conspiracy, the court granted defense requests to charge that the jury, in order to convict, must find such a single scheme and conspiracy. This issue was fully discussed in the Rule 30 conference and the court affirmed and eventually gave defendants' relevant requests to charge. At the defendants' request the court instructed that the single scheme included as objects, obtaining FICA recovery contracts from Allegheny County, the City of Pittsburgh and Pennsylvania for its school employees.

Petitioner's counsel took exception to the trial court's limiting the definition of separate conspiracies to those with no connection to another except that Torquato or one or more other individuals played a role in each, arguing that this was too narrow a definition of separate conspiracies. At this juncture, the government untimely requested two supplemental points introducing new "Master-Subsidiary" conspiracy language. The trial judge, over objection, accepted these supplemental points and on the next day instructed the jury to disregard its prior instructions on conspiracy and gave the government's supplemental points.

After brief deliberations the jury requested clarification of "the changes in the court's definition of conspiracy" and the original definition given. Responding to the jury's confusion, the trial court again attempted to clean the slate, instructing the jury to disregard all previous instructions concerning separate conspiracies. Ultimately, it instructed the jury:

> If you find the defendant not guilty of conspiracy on the basis of a finding that there was no agreement among the alleged co-conspirators, you may nevertheless find the defendant guilty of mail fraud as charged in the pertinent counts, if you find that the defendant participated with others in a common scheme as set forth in the indictment.
>
> * * *
>
> Similarly, if you find the defendant not guilty on Count I on the basis of finding that not one but several separate and distinct conspiracies existed, you may nevertheless find that the defendant violated the mail fraud statute, if the elements of a violation of that statute have been proven by the government beyond a reasonable doubt.

Defense counsel specifically took exception to the supplemental instructions, on the ground that they reversed the position taken by the parties and adopted by the court in the Rule 30 conference and actually instructed upon in the original instructions to the jury. Counsel reminded the court they had argued in reliance upon the court's affirmance of their single conspiracy and scheme points for charge. The court rejected these contentions and the Court of Appeals has affirmed this action with near casual oversight.

On the fourth day of jury deliberations, June 19, 1985, one of the jurors was severely injured in an automobile accident on the way to the courthouse. Petitioner refused to stipulate to an 11 person jury. The trial court permitted the jury to continue deliberations with only 11 jurors, pursuant to the 1983 amendment to Rule 23(b) of the Federal Rules of Criminal Procedure. On the sixth day of deliberation, the eleven person jury returned a verdict against petitioner finding him guilty of conspiracy, four counts of mail fraud and four Travel Act counts.

Petitioner appealed, raising among other issues, the Rule 30 violation and the unconstitutionality of Rule 23(b). At oral argument, petitioner's counsel devoted his entire time to the trial judge's reversal of position on the conspiracy and scheme instructions but, except for brief note of the non-critical "subsidiary conspiracy" language, the opinion fails to meet this argument. The Court of Appeals disposed of the supplemental instruction argument by concluding that the instruction on the subsidiary schemes did not state a new theory and that petitioner was on notice of the issue prior to closing argument. The Court of Appeals further found no constitutional defect in Rule 23(b) specifically holding that it does not allow a less than unanimous verdict. Rehearing and rehearing en banc were denied (Appendix D).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals' decision sanctions a Rule 30 violation by upholding the trial court's supplemental instructions on multiple conspiracies, reversing the agreed single conspiracy instructions, thereby allowing conviction for an offense not charged and presenting a new theory of criminal liability that the defense had no opportunity to address in closing argument.

The Court of Appeals simply rejected petitioner's contention that the supplemental instructions on single and multiple schemes and conspiracies presented a new theory of liability in violation of Rule 30 of the Federal Rules of Criminal Procedure and described an offense different from the one charged in the indictment. The Court of Appeals incorrectly stated that the supplemental charge was a correct statement of the law and "merely an elaboration of the earlier instruction", and that defendants were given notice of the instruction before closing argument (App. A, 13a). Petitioner submits that regardless of whether the supplemental instruction is a correct statement of the law (and we believe it was not), Rule 30 prohibits such a 180 degree variation from the original instructions on which counsel relied upon in their arguments to the jury and where the record demonstrates that there is fundamental prejudice to the petitioner.

Rule 30 provides in pertinent part: "The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed." The essential purpose of this rule is to "require the judge to inform the trial lawyers in a fair way what the charge is going to be, so that they may intelligently argue the case to the jury." *Ross v. United States*, 180 F. 2d 160, 165 (6th Cir. 1950); *United States v. Wander*, 601 F. 2d 1251, 1262

(3d Cir. 1979). The Circuit Courts of Appeals have granted reversals in cases involving Rule 30 violations when the change in the instructions is substantial [*United States v. Mandoza*, 473 F. 2d 697, 701 (5th Cir. 1973)], when the trial court's instructions repudiate counsel's argument [*United States v. Harvill*, 501 F. 2d 295, 297 (9th Cir. 1974)], or where the court's instructions deprived counsel of the opportunity to intelligently argue the case [*United States v. McCown*, 711 F. 2d 1441, 1452 (9th Cir. 1983); *Wright v. United States*, 339 F. 2d 578, 580 (9th Cir. 1964)].

In the instant case, the trial court pertinently instructed the jury in its main charge on the conspiracy issue as follows:

> Unless the jury finds beyond a reasonable doubt that the government has proved the existence of a single scheme to defraud, as charged in the indictment, the defendant must be acquitted of the pertinent counts. The single scheme charged includes the obtaining of FICA recovery contracts from Allegheny County, the City of Pittsburgh and also the Commonwealth of Pennsylvania. If you find that Mr. Torquato and others were involved in separate conspiracies concerning or regarding Allegheny County or City of Pittsburgh, or Pennsylvania school district FICA recovery contracts, and the defendant was not a participant in one or more of these separate conspiracies, then your verdict as to the defendant on the entire indictment must be not guilty.

This instruction was a defense request which was approved in the Rule 30 conference before closing arguments. A substantial portion of petitioner's counsel's argument focused on petitioner's participation being limited to only the Pennsylvania school district employees' FICA recovery contract. After the trial court gave

the above instruction, the court gave a definition of separate conspiracies to which defense counsel took exception. Following extended discussion on an appropriate definition, the government for the first time urged its new instruction on multiple conspiracies that eventually led to a second supplemental instruction, given in response to a jury question, which petitioner contends allowed the jury to convict on an offense not charged and sanctioned a prejudical variance from the indictment.

The offending supplemental instruction given to the jury is as follows:

> If you find the defendant not guilty of conspiracy on the basis of a finding that there was no agreement among the alleged co-conspirators, you may nevertheless find the defendant guilty of mail fraud as charged in the pertinent counts, if you find that the defendant participated with others in a common scheme as to set forth in the indictment.
>
> * * *
>
> Similarly, if you find the defendant not guilty on Count I on the basis of finding that not one but several separate and distinct conspiracies existed, you may nevertheless find that the defendant violated the mail fraud statute, if the elements of a violation of that statute have been proven by the government beyond a reasonable doubt.

In the guise of offering merely clarifying instructions, the government was able to put forward an entirely new legal theory. Its proof showed three separate conspiracies rather than the "single massive scheme" theory argued in the closing speeches. Through

the supplemental instructions, the jury was informed that they could also convict on the conspiracy even if they found three separate schemes involving different people in an undefined relationship to a master conspiracy.

Rule 30 was specifically designed to prevent the substantial prejudice that occurred here. The Court of Appeals' conclusion that petitioner had notice of the multiple conspiracy issue misconstrues the essence of Rule 30; that defense counsel has a right to rely upon the trial court's proposed action in charging the jury when counsel makes his or her closing argument.

The trial court's supplementary instructions not only violated Rule 30 but sanctioned a material variance of the sort condemned in *Kotteakos v. United States*, 328 U.S. 750 (1946). A function of Rule 30 is to limit the basis of liability to that understood at the close of the evidence by counsel and the court and articulated by the court in its charge rulings.

This is an important issue concerning the interpretation and implementation of Rule 30 of the Federal Rules of Criminal Procedure, and it has application to all federal criminal jury trials.

II.

The 1983 Amendment to Rule 23(b) of the Federal Rules of Criminal Procedure, authorizing the trial court to allow eleven person juries to return a valid verdict if one juror becomes unavailable, is unconstitutional.

Effective August 1, 1983, Rule 23(b) of the Federal Rules of Criminal Procedure was amended to permit the return of a valid verdict by 11 jurors. Prior to the 1983 Amendment, a verdict of less than 12 jurors was permitted only through an approved stipulation of the parties. In rejecting petitioner's challenge to

the constitutionality of Rule 23(b), the Court of Appeals held that the rule does not allow a less than unanimous verdict and that *Williams v. Florida*, 399 U.S. 78 (1970), is authority for the proposition that 12 jurors are not required for conviction in a federal criminal trial (App. A, 19a). In so holding, the court below upholds a rule of convenience to avoid retrial of a case at the severe and impermissible cost to the defendant of a constitutional right.

In *Apodaca v. Oregon*, 406 U.S. 404 (1972), five justices of this Court pronounced unanimity indispensible in a federal jury trial. The Court observed that this was based on "the long and unbroken line of Federal cases viewing the requirement as established by the Federal system". *Andres v. United States*, 333 U.S. 740 (1948). Unanimity is directly related to the deliberative function of the jury, serving to "effectuate the purpose of the jury system by promoting full expression of the views of all members of the jury and by insuring that those views are taken into account as fully and fairly as possible in reaching a verdict". *United States v. Scalzitti*, 578 F. 2d 507 (3d Cir. 1978).

The amended Rule 23(b) allows a trial court discretion to allow 11 person juries to continue deliberation if one juror becomes unavailable for any "just cause". Rule 23(b) was prompted by the dilemma posed in certain cases where a juror became unavailable after a lengthy trial and a mistrial would be extremely burdensome. Fed. R. Crim. P. 23(b) Advisory Committee Note; *United States v. Stratton*, 779 F. 2d 820, 831 (2d Cir. 1985). While the amended Rule 23(b) might provide "a better solution than the technique used in the past of (holding and) substituting an alternate juror" (App. A, 19a), petitioner submits that it is constitutional only where the defendant has effectively waived his right to have the case decided by the 12 persons he helped select, who have heard the entire case, and who will deliberate until reaching a unanimous verdict. Once a jury has commenced

deliberations, the loss of a deliberating member is a qualitatively different loss from mere numbers, curtailing a defendant's rights and going to the very structure of the jury trial. Reduction after the jury begins deliberations, particularly where the jury has not reached a verdict after several days of deliberations, impinges on unanimity, not number.

The Advisory Committee which wrote the 1983 Amendment to Rule 23(b) relies only upon *Williams v. Florida, supra,* and convenience for its authority in allowing an 11 person verdict in the case of disability during deliberations. But *Williams* only stands for the proposition that a state, in a state criminal trial, may provide for a jury of a lesser number than 12. Nothing in *Williams*, nor in any other case decided by this Court, allows less than unanimous verdicts in a federal criminal case. The nature and importance of the substantive right to a verdict of all the jurors who hear the evidence is plainly demonstrated by the procedural safeguards which have been established by many of the Circuit Courts of Appeals requiring that the defendant appear in open court and expressly and intellegently give his personal consent to a verdict of less than 12 jurors should a juror become disabled during deliberations [*United States v. Smith,* 523 F. 2d 788 (5th Cir. 1975); *United States v. Guerrero-Teralta,* 446 F. 2d 876 (9th Cir. 1971); *United States v. Taylor,* 498 F. 2d 390 (6th Cir. 1974)], or, in the alternative, requiring counsel to convince the trial court that the defendant is aware that he is waiving his absolute right to a verdict rendered by a 12 person jury. *United States v. Vega,* 447 F. 2d 698 (2d Cir. 1971); *United States v. Pacente,* 503 F. 2d 543 (7th Cir. 1974). A solution to the occasional problem of loss of a juror during deliberations that deprives a defendant of his right to have his case decided by all of the same 12 jurors who heard the evidence, speeches and instructions, is the most destructive of all possible solutions.

This argument is buttressed by the flat command of Rule

31(a) of the Federal Rules of Criminal Procedure that requires that "the verdict shall be unanimous." Unanimity is compromised by the amended Rule 23(b), and these two rules cannot be reconciled. Regardless of the resources expended on a particular trial or its protracted nature, unanimity simply cannot be cast aside absent a valid waiver. Petitioner suggests that certiorari should be granted to consider the constitutionality of amended Rule 23(b) to resolve an important constitutional and procedural issue that is likely to recur.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that this Court should issue a writ of certiorari to the Court of Appeals for the Third Circuit to review the instant decision.

Respectfully submitted,

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APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
FILED APRIL 28, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-5532, 85-5702, 85-5714

UNITED STATES OF AMERICA

v.

SMITH, WILLIAM T., JR.

WILLIAM T. SMITH, Appellant
in 85-5532 and 85-5714

UNITED STATES OF AMERICA

v.

STONEMAN, ALAN R.

Alan R. Stoneman, Appellant in 85-5702

On Appeal from the United States District Court
for the Middle District of Pennsylvania - Scranton
D.C. Criminal Nos. 84-00156-04, 84-00156-05

Argued March 18, 1986

Before: HUNTER, MANSMANN,
Circuit Judges, and
POLLAK,* *District Judge*

Opinion filed APRIL 28, 1986

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*Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

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OPINION OF THE COURT

HUNTER, *Circuit Judge*:

I. *INTRODUCTION*

1. XET, Ltd. d/b/a CTA, Ltd., Computer Technology Associates, Inc., John R. Torquato, Jr., William T. Smith, Alan R. Stoneman, Judy Ellis, and David Herbert were charged in a thirty-nine count indictment with conspiracy, 18 U.S.C. § 371 (1982), fifteen violations of the Interstate Transportation and Aid of Racketeering ("I.T.A.R." or "Travel Act") statute, 18 U.S.C. § 1952(a)(3) (1982) and the mail fraud statute, 18 U.S.C. § 1341 (1982). The indictment outlined a conspiracy involving fifty-one overt acts, seven mail fraud violations, and nine I.T.A.R. violations.

2. The conspiracy count alleged that the defendants sought to obtain Federal Insurance Contribution Act ("FICA") recovery contracts[1] from state and local entities, not by placing bids, but by bribing public officials with cash, stock, stock options, campaign contributions, employment, and paid travel. The defendants directed their efforts at obtaining the contracts for Allegheny County, the City of Pittsburgh, and the Pennsylvania school employees. The indictment alleged that the conspiracy existed from January 1983 until October 22, 1984.

3. Torquato, Ellis, and Herbert entered guilty pleas to various counts. Smith and Stoneman pleaded not guilty to all counts. Their trial began on March 26, 1985 and was completed on June 24, 1985. At trial, the government called twenty-two witnesses against Smith and Stoneman, including their principal witness, Torquato, to support the government's allegations that Smith had offered a total of $400,000 in bribes to the Treasurer and Attorney General of Pennsylvania and that Stoneman had participated in the bribery scheme. The defendants called eighty-eight witnesses including many public officials who had dealt with Torquato on the FICA recovery contracts.

4. The jury found Smith guilty of conspiracy, four counts of mail fraud and four I.T.A.R. counts. Stoneman was found guilty only of conspiracy. The court sentenced Smith, who could have received up to

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1. The amount of FICA tax paid by the employees of state and local governments in Pennsylvania is matched by the employing state or political subdivision. However, the tax need not be paid for employees subject to certain benefits for illness. If the government mistakenly pays the FICA taxes, it can claim a credit against future taxes and a refund for the employee. The procedure of obtaining the credits and refunds is known as FICA recovery. The defendant corporations sought contracts to prepare and submit FICA recoveries on behalf of state and local governments. The fees charged are determined by public bidding.

two million dollars from the scheme, to a twelve-year prison term and a $63,000 fine. Stoneman was sentenced to a prison term of four months and fined $10,000. The government presented no evidence that Stoneman was to receive any payment other than his usual attorney fees.

II. *EVIDENCE PRESENTED*

5. In early 1983, Smith and Torquato met to discuss how to obtain Pennsylvania state contracts to recover overpaid Social Security taxes. The two had been friends and business associates for over twenty years. Torquato is the son of a former Democratic County Chairman of Cambria County. Smith was then the Republican Chairman of Dauphin County. They agreed to make political contributions to officials in a position to award the contracts. Torquato introduced Smith to David I. Herbert, the State Director for Social Security, who controlled FICA recovery for Pennsylvania's public employees. The three men discussed other political subdivisions where they might obtain contracts. From January 1983 to October 1984, Smith and Torquato concentrated on obtaining contracts for Allegheny County, the City of Pittsburgh, and Pennsylvania state employees.

6. CTA, Ltd. obtained and performed a contract for FICA recovery for Allegheny County. This company had been formed by Stoneman on November 29, 1982. Torquato sent a copy of the proposal to Smith for review and wrote to him about contracts in other areas. Torquato paid $852.00 for James Scanlon, head of Allegheny County Computer Services, to take a trip to New York with his family. Stoneman paid this bill on August 31, 1983. Scanlon recommended that CTA, Ltd. be given the contract over other companies giving lower bids. Stoneman executed the contract on behalf of CTA, Ltd.

Appendix A

7. Torquato offered Gene Scanlon, James Scanlon's brother, a number of benefits including a $50,000 a year job at CTA, Ltd. for Jim Scanlon, mailing lists for his daughter's business, use of a rented car, payment for an airline ticket, and finally $100,000 to set up a "widget factory" in Hong Kong. Allegheny County paid CTA, Ltd. for the contract in November 1983. The next month, Torquato sent Smith $1,000 for his services along with a letter discussing how to influence Herbert.

8. Stoneman set up a California corporation, Com-Max, Inc., on January 5, 1984, but did not file the corporate documents that would have identified the officers of the corporation and disclosed its connection to CTA, Ltd. He sent 1,500 shares of Com-Max, Inc. to Herbert on January 22, 1984 with a letter stating that the stock would be bought back in three years for at least $15,000. A similar letter plus 1,500 shares was sent to Scott O'Donnell, Chief Clerk of Allegheny County.

9. CTA, Ltd. also obtained a FICA recovery contract for the employees of Pittsburgh. The company was to be paid $150,000 even though another contractor, who eventually did the job for the city, had bid $35,000. In fact, after CTA, Ltd. obtained the contract, Torquato hired this bidder as a subcontractor to do the work for $35,000. Stoneman sent Robert Rade Stone, President of the Pittsburgh City Council, a $6,374.86 check drawn on Stoneman's own bank account and stock options for 35,000 shares of Com-Max stock. Stoneman also sent stock options for 25,000 shares to Richard Schmeiser, Director of Finance for the City of Pittsburgh. Some of the profits from the FICA contracts were to be used to make the Com-Max stock valuable and, therefore, to benefit the public officials who were given Com-Max stock and stock and options.

Appendix A

10. During 1983, the defendants tried to obtain the FICA recovery contract for all Pennsylvania state employees. Torquato and Smith wanted a fee of $8,000,000 for the job. In November 1983, however, they discovered that the contract was to be performed in-house at a cost of $300,000. To secure the contract, Smith and Torquato had visited the Republican State Chairman, Robert Asher, in July 1983 and offered him $500,000 from the contract for the Republican Party. They decided that, in order to obtain the FICA recovery contracts, they needed to have jurisdiction over the contracts moved from the governor to the State Treasurer, R. Budd Dwyer, a friend of Smith's. Smith met with Senate Minority Whip Eugene Scanlon, David Herbert, and Jim Scanlon to discuss legislation to accomplish the change. After the legislation passed, Torquato purchased $500 worth of tickets to House Majority Leader Jim Manderino's fund raiser.

11. Torquato and Smith met with the Treasurer of Pennsylvania on March 2, 1984, and discussed a $300,000 payment to be divided among the Treasurer, the Treasurer's reelection campaign, and the Republican State Committee. Herbert continued to aid Torquato and Smith and on May 10, 1984 the Treasurer awarded the Pennsylvania contract to the Pennsylvania company formed by Smith in April 1984, Computer Technology Associates, Inc. Herbert was to be given $100,000 in a Swiss bank account. The contract, awarded on a no-bid basis, would have generated $4,000,000 in profit, to be split between Smith and Torquato, at an expense to the Commonwealth of $6,000,000. The contract was ultimately performed by an accounting firm, Levin-Horwath, for $1,300,000 with a possibility of up to thirty-five percent being rebated.

12. To avoid any competition in collecting FICA overpayments, Smith attempted to obtain a ruling

from the Attorney General of Pennsylvania, Leroy Zimmerman, that the contract was exclusive. Smith told Patrick Boyle, Press Secretary to the Attorney General, that Torquato would give $100,000 to the Attorney General's reelection campaign. The Attorney General ruled that the Treasurer's Counsel could decide the issue. The Treasurer's Counsel then ruled that the contract was exclusive.

13. When Smith and Torquato heard that their contract might be investigated, they were concerned that officials might discover that Com-Max was a holding company for CTA, Inc., the company handling the school employees contract. In June 1984, Smith formed a new corporation Application Software Systems, Inc. (A.S.S.I.). The FBI searched Torquato's residence on July 6, 1984 and found records of payments to be made to various Pennsylvania officials. The defendants were indicted on October 22, 1984.

III. *VARIANCE BETWEEN THE INDICTMENT AND THE PROOF*

14. Smith and Stoneman claim that the conspiracy charged in the indictment impermissibly varied from the evidence at trial because the evidence proved multiple conspiracies. There are two possible ways in which the evidence at trial may vary from the indictment. First, an amendment may alter the terms of the indictment and, therefore, constitute a per se violation of the fifth amendment grand jury clause. *See Stirone v. United States*, 361 U.S. 212, 217 (1960); *United States v. Castro*, 776 F.2d 1118, 1121 (3d Cir. 1985); *United States v. Somers*, 496 F.2d 723, 743 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974). Second, a variance may exist if the evidence at trial proves facts different from those alleged in the indictment. The evil of a variance is that defendants may be deprived of notice of the charges against them and may be subject

to double jeopardy. *See Gaither v. United States*, 413 F.2d 1061, 1071 (D.C. Cir. 1969). Variances are not subject to the *Stirone* per se rule. They are examined on a case-by-case basis and constitute reversible error only if the defendant was prejudiced. *See Castro*, 776 F.2d at 1121; *Somers*, 496 F.2d at 743. The Supreme Court recently considered the variance issue in *United States v. Miller*, 105 S.Ct. 1811 (1985). The *Miller* Court acknowledged that, under *Stirone*, trial evidence could not amend the indictment by broadening the bases for conviction. However, the court recognized that an indictment may permissibly allege more crimes than are actually proven at trial. *Id.* at 1815.

15. In the case before us, the court below properly instructed the jury that it could find that there was one master conspiracy and more than one subsidiary scheme. *See United States v. Kenny*, 462 F.2d 1205, 1261 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972). When a single conspiracy is charged in the indictment, there is a variance if the evidence at trial proves only the existence of multiple conspiracies. *See Kotteakos v. United States*, 328 U.S. 750 (1946); *United States v. Boyd*, 595 F.2d 120, 123 (3d Cir. 1978). However, a finding of a master conspiracy with sub-schemes does not constitute a finding of multiple, unrelated conspiracies and, therefore, would not create an impermissible variance. The question of whether a single conspiracy or multiple conspiracies existed is a fact question to be decided by the jury. This court must sustain the jury's verdict if there is substantial evidence, viewed in the light most favorable to the government, to support the finding of a single master conspiracy with subsidiary schemes. *See United States v. Brooks*, 697 F.2d 517, 523 (3d Cir. 1982), *cert. denied*, 460 U.S. 1071 (1983). The evidence supported a finding of a single conspiracy which was formed with the goal of obtaining FICA recovery

contracts through bribery and fraud. The fact that the group sought more than one contract does not necessarily mean that there was more than one conspiracy.

16. The defendants contend that while the indictment charged one conspiracy, the evidence showed that three separate conspiracies existed: one to obtain the Allegheny County contract, one to obtain the Pittsburgh contract, and one to obtain the Pennsylvania employees contract. Smith claims that he was not part of the Allegheny contract or the Pittsburgh contract. He relies on *United States v. Camiel*, 689 F.2d 31 (3d Cir. 1982), for his argument that a variance exists. In *Camiel* we found a prejudicial variance when an indictment charged a single scheme for creating no-work jobs on the government payroll, while the evidence at trial supported an inference of two or more conspiracies. The evidence could not support a reasonable inference of a single scheme because the alleged coparticipants were members of two antagonistic factions which would not work together. *Camiel* is clearly distinguishable from the case before us as there is no evidence of antagonistic groups. We find that the evidence presented does support the jury's finding of a single conspiracy.

17. Smith claims that his only possible involvement in the Allegheny or Pittsburgh schemes was in forming Application Software Systems, Inc. ("A.S.S.I."). He contends that since concealment of the crime after the object of the conspiracy has been attained is not part of the conspiracy, *see Grunewald v. United States*, 353 U.S. 391 (1957); *United States v. Pflaumer*, 774 F.2d 1224, 1232 (3d Cir. 1985), he cannot be placed in the Allegheny and Pittsburgh schemes. This argument fails since the evidence supports a finding of a single conspiracy and a finding that Smith was involved in all three schemes well

before the formation of A.S.S.I. During and after the formation of A.S.S.I. the defendants continued to attempt to obtain FICA recovery contracts.

IV. *SUPPLEMENTAL JURY INSTRUCTIONS ON MASTER CONSPIRACY*

18. On June 13, 1985 the trial court instructed the jury on the conspiracy as follows:

> The indictment alleges the existence of a conspiracy to commit mail fraud, and additionally, charges mail fraud itself. An essential element of both charges is that the Government must prove beyond a reasonable doubt the existence of a single scheme to defraud as charged in the indictment.
>
> A Defendant may not be convicted unless he was a willing, knowing and active participant in the particular scheme to defraud alleged in this indictment.
>
> Unless the jury finds beyond a reasonable doubt that the Government has proved the existence of a single scheme to defraud, as charged in the indictment, the Defendant must be acquitted of the pertinent counts. The single scheme charged includes the obtaining of FICA recovery contracts from Allegheny County, the City of Pittsburgh and also the Commonwealth of Pennsylvania.
>
> If you find that Mr. Torquato and others were involved in separate conspiracies concerning or regarding Allegheny County or City of Pittsburgh, or Pennsylvania School District FICA recovery contracts, and that the Defendant was not a participant in one or more of these separate conspiracies, then

> your verdict as to the Defendant on the entire indictment must be not guilty.
>
> By separate conspiracy, I mean a conspiracy that has no connection with another conspiracy except for the fact that John Torquato, Jr., or one or more other individuals, played a role in both conspiracies.
>
> You may, however, find that the Defendant participated in the conspiracy charged in the indictment even if that conspiracy encompassed three related subconspiracies involving different groups of individuals.

Both Smith and Stoneman object to the following supplemental instructions given to the jury the next day on the issue of a master conspiracy with subsidiary schemes:

> A single conspiracy is one in which the Defendants and those with whom they are charged with conspiring share a common goal of the conspiracy set forth in the indictment. Separate conspiracies, although they may have common elements, common participants, common means, some common objectives, or other common factors, but which lack the critical element of common objectives of the conspiracy on the part of all of the participants, do not qualify as a single conspiracy.
>
> . . .
>
> The gist of a criminal conspiracy may involve numerous transactions and the fact that conspirators individually or in groups perform different tasks in pursuing a

common goal does not necessitate a finding of several conspiracies.

Even if a small group is at the heart of an unlawful agreement, others who knowingly participate with core members to achieve a common goal may be members of a single conspiracy.

Accordingly, you may find that a master conspiracy for the obtaining of FICA recovery contracts by a bribery and fraud existed and that more than one subsidiary scheme was involved. You should review the indictment and determine if the master conspiracy charged therein has been proven.

19. The defendants claim that these instructions lacked the "concrete accuracy" required of supplemental instructions. *See Bollenbach v. United States*, 326 U.S. 607, 613 (1946). They contend that the jury's question concerning whether the defendants had to be involved in all three FICA recovery contracts if they were to be found guilty of conspiracy shows that instructions confused the jury. They further claim that the instructions on master conspiracy and subsidiary scheme presented a new theory of liability wholly different from the theory argued at trial. This alleged change in theory, they maintain, violated Federal Rule of Criminal Procedure 30[2] because defense counsel was

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2. Rule 30 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the request prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party

not given notice of the instruction before closing argument. Material modifications of instructions will give rise to a violation of Rule 30 because the defendant is not given an opportunity to address the charge. Finally, the defendants argue that the instruction described an offense different than the one charged in the indictment and therefore created an impermissible variance under *Kotteakos* and *Stirone*.

20. We are unpersuaded by these arguments and find that the defendants were not prejudiced by the giving of the supplemental charge. We first note that the instruction given was a correct statement of the law. *See United States v. Kenny*, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972). Moreover, the supplemental instruction on a master conspiracy and subsidiary scheme did not present a new theory of criminal liability and was not a material modification of the original instructions. The supplemental instruction was merely an elaboration of the earlier instruction. The instruction explained that a single conspiracy rather than multiple, unrelated conspiracies had to be found. However, the instruction also stated the single conspiracy could consist of a master conspiracy with one common objective but with several subsidiary schemes.

21. The defendants had notice of the multiple conspiracy issue. The issue was raised in the briefs for pretrial motions. At that time the government cited to *Kenny*. The defendants themselves had proposed supplemental instructions which addressed the need to find a single conspiracy. At the charge conference,

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may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

the parties referred to the question of whether each FICA recovery contract was a subpart of the conspiracy. Indeed, it was defense counsel who requested a supplementary instruction on what constituted a separate conspiracy. The charge made it clear to the jury that a single conspiracy must have a common objective. The instruction on subsidiary schemes did not state a new theory and defense counsel had notice of the issue. There was, therefore, no violation of Rule 30.[3]

V. *JURY INSTRUCTIONS ON THE TRAVEL ACT VIOLATIONS*

22. Counts 11 to 16 of the indictment charged Smith with violations of the Travel Act, 18 U.S.C. § 1952.[4] Smith was acquitted on Counts 11 and 16.

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3. Supplementary instruction #32 stated:

> Even if you find that multiple conspiracies existed, you still must individually consider the substantive violations contained in counts 2 through 16, and determine if a particular defendant is criminally responsible for these distinct uses of the United States mail and the facilities of interstate commerce.

We need not address the defendant's argument that instruction #32 was improper since the jury found the defendants guilty of conspiracy and therefore did not need to follow instruction #32.

4. 18 U.S.C. § 1952 states:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent –
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

which referred to Torquato's travel on January 24 and June 7, 1984. He was convicted, however, on Counts 12 through 15 which referred to Torquato's travel on February 27, March 19, April 17, and April 29, 1984.

23. The district court instructed the jury on the Travel Act violations as follows:

> The term 'interstate commerce' means transportation or movement including the use of interstate telephone facilities and the movement of mail between one state and another state and while it must be proved that an individual used the facility of interstate commerce with the specific intent to promote, manage, establish or carry on an unlawful activity, it need not be proven that such purpose was the only reason promoting the facility of commerce to be used.

Smith claims that the jury should have been specifically instructed that there had to be an act of bribery subsequent to each trip by Torquato. Smith argues that the district court did not properly charge on the requirement that there be a sufficient nexus between the interstate travel and the unlawful activity. Smith claims that the district court erred in refusing to give a supplemental instruction stating:

> There must be a connection between the travel and the subsequent act of bribery. It would not be enough, for example, for the government to prove that travel occurred on a particular occasion and at some subsequent time an act of bribery occurred unrelated to

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and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years. . . .

> the travel. The travel may not be merely incidental to the unlawful activity. There must be a coincidence between the travel and the act of bribery in the sense that the purpose of the travel (or use of interstate facility) was to perform the act of bribery and, thereafter, an act of bribery was performed that was contemplated when the travel took place.

24. There is no requirement that the interstate travel forming the basis of a Travel Act violation be essential to the unlawful scheme. It need only make easier or facilitate the unlawful activity. *See United States v. Perrin*, 580 F.2d 730, 736 (5th Cir.), *aff'd*, 444 U.S. 37 (1978) (Travel Act violation based on act of telephoning map service out of state). However, the nexus between the travel and the unlawful scheme may be so "isolated, minimal, inconsequential, and nonessential" to the scheme that it is "insufficient to establish jurisdiction under the Travel Act." *Id.* at 735. *See also Rewis v. United States*, 401 U.S. 808 (1971) (although the defendant ran a gambling establishment, his out-of-state customers were an insufficient basis for charging a Travel Act violation); *United States v. Isaacs*, 439 F.2d 1124, 1146 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (no Travel Act violation based on accepting a check that cleared through an out-of-state Federal Reserve Bank); *United States v. McCormick*, 442 F.2d 316 (7th Cir. 1971) (no Travel Act violation based on advertising for an illegal lottery ticket salesman in a newspaper with 2-3% out-of-state subscribers).

25. In *United States v. Wander*, 601 F.2d 1251 (3d Cir. 1979), this court found that there was a sufficient interstate nexus to establish a Travel Act violation based on acts similar to those in question in

the case before us. In *Wander* a group of conspirators were acting in Pittsburgh. One member, Currie, went to Florida for reasons unrelated to the conspiracy. Nevertheless, telephone calls to Currie and travel by Currie in returning to Pittsburgh formed the basis for a Travel Act charge. We found that while the "extortion scheme could have been carried out without any interstate involvement had Currie remained in Pittsburgh . . . . once Currie moved to Florida it became essential to the implementation of the defendants' scheme that they use interstate facilities to secure her presence in Pittsburgh." *Id.* at 1255. Similarly, interstate travel was not an absolute necessity to the bribery scheme we are now considering, but because one of the participants, Stoneman, was in California, interstate travel did facilitate the planning and implementation of the scheme.

26. The district court has wide discretion in charging the jury. We will find that the court erred in refusing to give an instruction only if the instruction was correct, not substantially covered by other instructions, and was so important that the omission of the instruction prejudiced the defendant. *See United States v. Sans*, 731 F.2d 1521, 1539 (11th Cir.), *cert. denied*, 105 S.Ct. 791 (1984). The district court in this case adequately charged the jury on the need for a nexus between the travel and the bribery when it stated "transportation . . . between one state and another state" requires proof that the "individual used the facility of interstate commerce with the specific intent to promote, manage, establish or carry on an unlawful activity. . . ." The evidence shows that Torquato, alone or with Smith did meet with government officials as part of the bribery scheme after each of the trips.

Appendix A

VI. *ELEVEN PERSON JURY*

27. On the fourth day of jury deliberation, after a three-month trial, one of the jurors was severely injured in an automobile accident. The defendants refused to stipulate to an eleven-person jury. The district court judge permitted the jury to continue deliberation with only eleven jurors pursuant to Federal Rule of Criminal Procedure 23(b), which states:

> (b) **Jury of Less Than Twelve.** Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

Rule 23(b) was amended in 1983 to give judges the discretion to allow eleven person juries to continue deliberation if one juror became unavailable. Before 1983, eleven person juries were permitted only by stipulation. Stoneman and Smith challenge the constitutionality of Rule 23(b).

28. Only two courts have considered the constitutionality of the discretionary part of Rule 23(b). A district court applied Rule 23(b) when one juror saw some notes of the United States Attorney after deliberations had begun. *See United States v. Bambino*, 598 F. Supp. 646 (D.N.J. 1984). The Second Circuit recently considered the constitutionality of

Rule 23(b) at length in *United States v. Lowell*, Nos. 84-1441, 1459, 1460, 1463, 1365 (2d Cir. December 13, 1985), *cert. denied*, 54 U.S.L.W. 3562 (U.S. February 24, 1986). We agree with both of these courts that Rule 23(b) is constitutional.

29. The Supreme Court has held that a six-member jury is constitutionally permitted. *See Williams v. Florida*, 399 U.S. 78 (1970). It is clear to us that twelve jurors are not required for a conviction. Contrary to the defendant's contentions, Rule 23(b) does not allow a less than unanimous verdict. Rule 23(b) was amended to deal with those situations in which a juror became unavailable after a lengthy trial and a mistrial would be extremely burdensome. Rule 23(b) provides a better solution than the technique used in the past of substituting an alternate juror even after deliberations had begun. *See United States v. Hillard*, 701 F.2d 1052 (2d Cir.), *cert. denied*, 461 U.S. 958 (1983). We find no constitutional defect in the rule.

VII. *DISCLOSURE OF ALCOHOL TREATMENT RECORDS OF GOVERNMENT WITNESSES*

30. Smith and Stoneman claim that the denial of their motion to order disclosure of the alcoholism treatment records of government witnesses John R. Torquato, Jr. and Judy Ellis deprived the defendants of their sixth amendment rights. Torquato and Ellis admitted that they had been alcoholics and had attended a rehabilitation center, the Care Unit Hospital of Orange, California ("Care Unit"), before the trial. The defendants cross-examined Torquato and Ellis on their alcoholism and had the opportunity to question the other witnesses, who had dealt with Torquato and Ellis, on any effects of the alcoholism. However, the defendants sought to obtain the treatment records of Torquato and Ellis from the Care Center. They were

most concerned with the records of Torquato, the government's principal witness. They claimed that without the records they would be deprived of their sixth amendment rights to confrontation and compulsory process of witnesses.

31. The records of patients in drug rehabilitation programs that are assisted by the federal government must be kept confidential. *See* 42 U.S.C.A. § 290dd-3(a) (West Supp. 1985). A court may order disclosure pursuant to § 290dd-3(b)(2)(c) and the regulations at 42 C.F.R. § 2.61 (1985) if "good cause" has been shown. "In assessing good cause the court shall weigh the public interest and need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services." *Id.* The application should be denied when "other competent evidence of sources of information are available. . . ." 42 C.F.R. § 2.64(e) (1985). Records can be disclosed only if they contain objective data unless they fall within the exception in 42 C.F.R. § 2.63 (1985) which provides that, "[w]hen a patient in litigation offers testimony or other evidence pertaining to the content of his communications with the program," the records may be disclosed. Because Torquato did not testify on his communications while in the program, this exception does not apply. Therefore, the defendants can seek the disclosure of only those portions of the records, if any, that contain objective data.

32. Although Torquato stated that he would waive the physician-patient privilege, there is a public interest in maintaining the confidentiality of patient records at the Care Unit. The defendants have not made a sufficient showing of need for the records. They wished to use the records to impeach Torquato's credibility. Torquato had admitted that he had been an alcoholic. Moreover he was subject to cross-

examination for seven days and the defendants had the opportunity to examine other witnesses on Torquato's alcoholism. Therefore, we do not find that the defendants have shown good cause for disclosing the records or that their right o cross-examine Torquato was impaired. The public interest in confidentiality outweighs the defendant's needs when the records would provide little new material that could be used to impeach the witness's credibility. *See United States v. Graham*, 548 F.2d 1302, 1314 (8th Cir. 1977); *Bell v. State*, 385 So.2d 78 (Ala. App. 1980). A defendant is not entitled to obtain evidence that would only marginally impugn a witness's credibility but that would severely prejudice a public interest requiring confidentiality. *Cf. United States v. Adams*, 759 F.2d 1099 (3d Cir.), *cert. denied*, 106 S.Ct. 275 and 106 S.Ct. 336 (1985) (court limited cross-examination of witness in the Witness Protection Program).

VIII. *SEVERANCE OF STONEMAN'S TRIAL*

33. Stoneman claims that he was prejudiced when the trial court denied his motion to have his trial severed pursuant to Federal Rule of Criminal Procedure 14. He conjectures that the consolidated trial confused the jury because the government used the term "CTA" to refer to both CTA, Ltd. and Computer Technology Associates, Inc. Stoneman did not object to the use of the name CTA during trial. Furthermore, we do not believe that the use of the term resulted in undue prejudice to Stoneman.

34. Stoneman also maintains that he was prejudiced by being tried with Smith because the extensive damaging evidence against Smith and testimony on Torquato's actions "rubbed off" onto Stoneman tc render him guilty by association. *See United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976), citing *United States v. Kelly*, 349 F.2d 720,

756-59 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). We review the trial court decision not to sever the trial only for an abuse of discretion. *See United States v. Boyd*, 595 F.2d 120, 125 (3d Cir. 1978); *United States v. Somers*, 496 F.2d 723 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974). As long as the government has charged conspiracy in good faith, an allegation of conspiracy is a sufficient reason for trying the conspiracy and all substantive offenses together. *See Somers*, 496 F.2d at 729-30. In determining whether a particular defendant was prejudiced by a joinder of defendants, we look to whether the jury could compartmentalize the evidence against each defendant. A defendant is not entitled to a severance merely because the evidence against his codefendants is more damaging than the evidence against him. *See United States v. DiPasquale*, 740 F.2d 1282, 1293 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 1226 (1985); *United States v. Dansker*, 537 F.2d 40, 62 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). We conclude that the jury could understand what evidence concerned each defendant and, therefore, that Stoneman was not prejudiced by the denial of his motion to sever the trial.

IX. *SUFFICIENCY OF THE EVIDENCE TO CONVICT STONEMAN*

35. Stoneman contends that there is insufficient evidence to support his conviction. In addressing this contention we must determine if there was sufficient evidence on which reasonable persons could find Stoneman guilty beyond a reasonable doubt. In doing so, we must view the evidence in a light most favorable to the government. *See Glasser v. United States*, 315 U.S. 60, 80 (1942). The district court found that the verdict was supported by substantial evidence.

36. The evidence showed that Stoneman incorporated the California corporation, Com-Max,

Inc. He sent stock in the corporation to Pennsylvania officials including David I. Herbert, the State Director of Social Security, Robert Rade Stone, the President of Pittsburgh City Council, Scott O'Donnell, the Administrator of Allegheny County, and Ronald Schmeizer, an employee of the City of Pittsburgh. He also sent a check for $6,374.86, drawn on his own bank account, to Stone. Torquato testified that Stoneman was aware of the reason for sending stock, stock options, and the check to the Pennsylvania officials. Torquato also testified that Stoneman suggested his own bank account be used for the check to make it difficult to trace the payment to Torquato. The government noted that the cover letters to the officials refer to Stoneman and not Torquato, that the deposit slip for $6,374.86 was entered as a split deposit, and that the schedule of officers for Com-Max, Inc. was never filed with the California Secretary of State. The government claims that these actions were taken to avoid creating a paper trail to the company. Stoneman maintains that this argument is weak, since Stoneman's actions avoided any paper connection between Torquato and Com-Max, Inc., but provided ample evidence of a link between Stoneman himself and the corporation. There was evidence that Stoneman did not cooperate with the FBI investigation.

37. Stoneman contends that all of his actions were the normal activities of an attorney for a small corporation. He claims that he had no knowledge of who the Pennsylvania officials were or that any bribery scheme existed. A person is not guilty of conspiracy unless he had knowledge of the illicit purpose of the conspiracy when he performed acts that furthered that purpose. *See United States v. Klein*, 515 F.2d 751, 753 (3d Cir. 1975). There was no direct evidence that Stoneman had knowledge of some improper purpose.

Stoneman also observes that the government offered no evidence of motive. *See United States v. Wise*, 108 F.2d 379 (7th Cir. 1939). There was no evidence that Stoneman received, or would ever have received, anything more than his normal attorney fees. However, the jury was entitled to make a finding of knowledge and therefore guilt based on circumstantial evidence and credibility. Clearly, the jury did not believe Stoneman's explanations of his actions. We find that the jury could properly infer guilt from the evidence presented. *See United States v. Ordones*, 469 F.2d 70, 71 (9th Cir. 1972) (jury need not believe defendant's story that he had no knowledge).

X. *CONCLUSION*

38. For the reasons discussed above we will affirm the judgment of the district court in all respects.

A True Copy:

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Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B—OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA FILED OCTOBER 17, 1985

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 84-00156-04

(Judge Muir)

UNITED STATES OF AMERICA

vs.

WILLIAM T. SMITH

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Appendix B

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 84-00156-04

(Judge Muir)

UNITED STATES OF AMERICA

vs.

WILLIAM T. SMITH

OPINION

MUIR, District Judge.

I. Introduction and Procedural History.

Currently pending before this Court is William T. Smith's motion for judgment or acquittal and in the alternative for a new trial. On October 22, 1984, a sixteen count indictment was returned against two corporate and five individual Defendants including William T. Smith. Smith's trial began on March 26, 1985 and ended on June 24, 1985 when the jury returned a verdict of guilty on counts 1, 2, 3, 7, 9, and 12 through 15. Count 1 charged conspiracy; counts 2, 3, and 7 changed mail fraud under 18 U.S.C. § 1341; counts 9 and 12 through 15 charged interstate transportation in aid of racketeering under 18 U.S.C. § 1952(a)(3).

II. Evidence Regarding Multiple Conspiracies.

Smith argues that he is entitled to a judgment of acquittal

or a new trial because the Government did not prove a single conspiracy as charged in count 1 of the indictment but instead it proved several smaller conspiracies. He also contends that there is a variance between the events charged in the indictment and the proof at trial which was prejudicial to him.

The Court must grant a motion for judgment of acquittal ". . . if the evidence is insufficient to sustain a conviction" of the offenses charged in the indictment, Rule 29(a) Fed.R.Crim.P. The standand of review is whether, viewing the evidence in the light most favorable to the Government, the jury's verdict is supported by substantial evidence. Glasser vs. United States, 315 U.S. 60, 80 (1942), United States vs. Delerme, 457 F.2d 156, 160 (3d Cir. 1972). The issue on a motion for acquittal is whether this Court has reason to believe that there was sufficient evidence on which reasonable persons could find Smith guilty beyond a reasonable doubt; United States vs. Pratt, 429 F.2d 690 (3d Cir. 1970), United States vs. Leach, 427 F.2d 1107 (1st Cir. 1970).

In considering a motion for a new trial, "The Court . . . may grant a new trial . . . if required in the interest of justice." Rule 33 Fed.R.Crim.P. Unlike a motion for judgment of acquittal, the motion for new trial is based upon the weight of the evidence, and the Court may weigh evidence and consider the credibility of witnesses. United States vs. Pepe, 209 F.Supp. 542, 595 (D. Del. 1962), *aff'd per curiam*, 339 F.2d 264 (3d Cir. 1964). The motion for new trial is addressed to the discretion of the Court and the power to grant a new trial on the ground that the verdict is against the weight of the evidence should only be invoked in exceptional cases. Wright, Federal Practice & Procedure: Criminal 2d § 553.

Smith contends that the evidence showed that there were three

separate conspiracies embracing Allegheny County, the City of Pittsburgh, and the Commonwealth of Pennsylvania and that Smith was not a member of the two conspiracies involving Allegheny County and the City of Pittsburgh. Smith alleges that the evidence showed three separate mail fraud conspiracies rather than the one conspiracy described in Count 1 of the indictment and also showed three separate conspiracies to violate 18 U.S.C. § 1952 which prohibits interstate transportation in aid of racketeering, rather than the single conspiracy charged in count 1 of the indictment. The evidence was that Smith and others attempted as part of one overall scheme to influence state and local public officials to award FICA recovery contracts to a California corporation, XET, Ltd. d/b/a/ CTA Ltd., and that Smith was working for and on behalf of the corporation with John Torquato who was the moving force behind the scheme. Torquato testified that Smith knew about and assisted Torquato's activities in bribing public officials, that bribes were paid to and goods and services rendered to members of the Scanlon family, Robert Rade Stone, President of the Pittsburgh City Council, and other officials in connection with said scheme. Smith knew that stock in the corporation known as COM-MAX was being delivered to state, city, and county officials as bribes.

Smith was aware of the dealings between the individual Defendants and public officials involved in various FICA recovery contracts. The State Director of Social Security for Public Employees, David Herbert, approved all three contracts and received stock in COM-MAX Corporation. James Scanlon, an Allegheny County official, recommended CTA to the City of Pittsburgh and to the State of Pennsylvania and received free travel and promises of employment for himself and family members. James Scanlon was also instrumental in introducing John Torquato and Defendant Smith to Eugene Scanlon, his

brother and Senate Minority leader of the Senate of the Commonwealth of Pennsylvania, who assisted in passage of legislation to facilitate the FICA recovery by CTA on behalf of Pennsylvania school entities.

Torquato testified that he discussed with Smith that COM-MAX stock or stock options had been delivered to David Herbert, the above-mentioned State Director, Robert Rade Stone, President of the Pittsburgh City Council, Scott R. O'Donnell, Chief Clerk to the Commissioners of Allegheny County, and Ronald Schmeizer, Director of Finance of the City of Pittsburgh. It would appear that these public officials were told by Torquato that the money from the state, county, and city FICA recoveries would be used to fund and enhance the COM-MAX Corporation. When there were rumors of an investigation, Defendant Smith created yet another company known as Application Software Systems to conceal the prior delivery of COM-MAX stock to those public officials and to make it more difficult to establish a connection between COM-MAX and CTA. Smith formed this company with full knowledge of its purpose in furthering the single conspiracy. The evidence introduced during Smith's trial showed beyond a reasonable doubt that Smith was guilty of involvement in one conspiracy involving the awarding of FICA recovery contracts to CTA, Ltd.

Smith argues that there is a variance between the events as changed in the indictment and the proof offered at trial which prejudices a substantial right of Smith and cites United States vs. Camiel, 689 F.2d 31 (3d Cir. 1982) as authority for this argument. *Camiel* is distinguishable from this case. In *Camiel*, the Court held that the evidence showed the existence of two or perhaps even four distinct schemes to defraud, that the evidence was insufficient to support a finding of one scheme and entered

a directed verdict of acquittal. The Court applied the doctrine set forth in Kotteakos vs. United States, 328 U.S. 750, 66 S.Ct. 1239 (1946) which held that in order for a trial judge to reverse a jury conviction in a mail fraud scheme case, (1) there must be a variance between the indictment and the proof and (2) the variance must prejudice some substantial right of the Defendant. The evidence presented during the Smith trial does not support the argument that there was a variance between the indictment and the proof. The evidence showed beyond a reasonable doubt that there was a single conspiracy; thus, there was no prejudicial variance between the facts set forth in the indictment and the proof at trial.

III. The Court's Charge Regarding Single and Multiple Conspiracies.

Smith contends that he is entitled to a judgment of acquittal or a new trial because this Court's additional charge to the jury on June 14, 1985 violated Fed.R.Crim.P. 30 and was prejudicial to Smith.

On June 11 and 12, 1985, this Court ruled on counsels' requested points for charge. We informed counsel that we would cover Smith's point 30 and Smith's supplemental point 9 which involve single and separate conspiracies. Transcript, Volume 38, p. 5, and Volume 39, p. 3. Smith's point 30 is as follows:

> If you find that John R. Torquato, Jr. and others were involved in a separate conspiracy or conspiracies regarding the Allegheny County and City of Pittsburgh FICA recovery contracts in which the defendant, William Smith, was not a participant, then your verdict as to William Smith

on the entire indictment must be not guilty. (authorities omitted)

Defendant Smith's supplemental point 9 is as follows:

> 1. The indictment alleges the existence of a conspiracy to commit mail fraud and, additionally, charges mail fraud itself. An essential element of both charges is that government prove beyond a reasonable doubt the existence of a single scheme to defraud and that the single scheme to defraud not be substantially different from the scheme charged in the indictment.
>
> 2. To convict on this aspect of the charges, each of the jurors must find that the government has proved beyond a reasonable doubt that the defendant participated in the same single scheme to defraud and the scheme to defraud in which the defendant is found to have participated is the same scheme as the fraudulent scheme alleged in the indictment. The defendant may not be convicted unless he was a willing, knowing and active participant in the particular scheme to defraud alleged in this indictment.
>
> 3. Unless the jury finds beyond a reasonable doubt that the government has proved the existence of a single scheme to defraud, as charged in the indictment, the defendant must be acquitted of the pertinent counts. (authorities omitted)

Counsel gave their closing arguments on June 12 and 13,

1985 and during those closings, no counsel raised the issue of multiple and single conspiracies. On June 13, 1985, this Court instructed the jury that the indictment charges a single scheme to defraud and Smith must have participated in such a scheme or one not substantially different, and that unless the single scheme had been proven, Smith must be acquitted of the pertinent counts. We instructed the jury as follows:

> The indictment alleges the existence of a conspiracy to commit mail fraud, and additionally, charges mail fraud itself. An essential element of both charges is that the Government must prove beyond a reasonable doubt the existence of a single scheme to defraud as charged in the indictment.
>
> A Defendant may not be convicted unless he was a willing, knowing and active participant in the particular scheme to defraud alleged in this indictment.
>
> Unless the jury finds beyond a reasonable doubt that the Government has proved the existence of a single scheme to defraud, as charged in the indictment, the Defendant must be acquitted of the pertinent counts. The single scheme charged includes the obtaining of FICA recovery contracts from Allegheny County, the City of Pittsburgh and also the Commonwealth of Pennsylvania.
>
> If you find that Mr. Torquato and others were involved in separate conspiracies concerning or regarding Allegheny County or City of Pittsburgh, or Pennsylvania School District FICA recovery

> contracts, and that the Defendant was not a participant in one or more of these separate conspiracies, then your verdict as to the Defendant on the entire indictment must be not guilty.
>
> By separate conspiracy, I mean a conspiracy that has no connection with another conspiracy except for the fact that John Torquato, Jr., or one or more other individuals, played a role in both conspiracies.
>
> You may, however, find that the Defendant participated in the conspiracy charged in the indictment even if that conspiracy encompassed three related subconspiracies involving different groups of individuals.

Transcript Volume 40 pp. 153-154.

At the conclusion of the charge, counsel for Smith took exception to the portion of the charge that defined separate conspiracies. Transcript Volume 40, p. 188. Smith's counsel propounded an instruction which he desired directed towards defining separate conspiracies but which in our view was defective. Because it was late in the day and it was inappropriate for the jury to start its deliberations at that time, we directed counsel to confer and attempt to agree upon adequate definitions of single and separate conspiracies for a supplemental instruction the following morning. Transcript Volume 40, p. 188-193.

On June 14, 1985, we conferred with all counsel and in the absence of an agreed instruction, we then gave the following new instruction to the jury on the issue of multiple conspiracies:

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"THE COURT: At the end of the Court's instructions there are always requested changes, and we find that some of the requests that have been made do have merit.

We will give you some further instructions.

Yesterday, I talked very briefly about separate conspiracies. I'm going to ask you to disregard what was said then because we have an elaboration and a correction of it.

* * *

A single conspiracy is one in which the Defendants and those with whom they are charged with conspiring share a common goal of the conspiracy set forth in the indictment. Separate conspiracies, although they may have common elements, common participants, common means, some common objectives, or other common factors, but which lack the critical element of common objectives of the conspiracy on the part of all of the participants, do not qualify as a single conspiracy.

* * *

The gist of a criminal conspiracy may involve numerous transactions and the fact that conspirators individually or in groups perform different tasks in pursuing a common goal does not necessitate a finding of several conspiracies.

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> Even if a small group is at the heart of an unlawful agreement, others who knowingly participate with core members to achieve a common goal may be members of a single conspiracy.
>
> Accordingly, you may find that a master conspiracy for the obtaining of FICA recovery contracts by a bribery and fraud existed and that more than one subsidiary scheme was involved. You should review the indictment and determine if the master conspiracy charged therein has been proven.

Transcript Vol. 41, pp. 34-36. Parenthetically, the transcript shows the use of the article "a" before "bribery and fraud". The Court is of the view that the article was never stated and that the transcript is in error.

Smith contends that the giving of the new instruction on June 14, 1985 violated Rule 30 of the Federal Rules of Civil Procedure and that he was prejudiced by the new instruction. Rule 30 of the Federal Rules of Civil Procedure states that "The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury." Rule 30 requires the Court to inform counsel of its proposed action upon counsel's requested points for charge; it does not require the court to give counsel further information about the contents of the charge. Our instruction to the jury regarding conspiracy on June 14, 1985 was not a departure from the requirements of Rule 30. Even if giving the new instruction had violated Rule 30, failure to comply with the requirements of Rule 30 does not ipso facto mandate reversal, Hamling vs. United States, 418 U.S. 87, 135, 94 S.Ct. 2887 (1974).

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The question is whether or not the charge in its entirety was fundamentally prejudicial to Smith. United States vs. Hartman, 409 F.2d 198 (3d Cir. 1969), United States vs. Wander, 601 F.2d 1251 (3d Cir. 1979).

Smith contends that he was prejudiced by the Court's giving of the new instruction on June 14, 1985 because Smith's counsel did not have the opportunity to know before his closing argument that an instruction would be given regarding single and multiple conspiracies. This is not a correct statement of what took place at trial. The concepts of single and multiple conspiracies had been raised by counsel for Smith himself in his proposed point #30 and supplemental point #9. The new instructions related to an issue counsel had been advised would be covered in the charge.

Smith also contends that he was prejudiced because the new instruction altered the Government's theory of the conspiracy such that the indictment failed to inform Smith of the nature of the charges against him. The new charge was not a change in the Government's theory that there was one conspiracy and that Smith was a participant in this conspiracy, but was an elaboration on the concept of single and multiple conspiracies.

There are additional reasons why the new instruction did not prejudice Defendant Smith. First, the charge as a whole after the new instruction was given covered the area of conspiracy completely and was an accurate statement of the law. This Count's primary reason for giving the new instruction was to prevent jury confusion.

Second, it was defense counsel who took exception to the portion of the charge that addressed separate conspiracies and requested an additional instruction defining them. The Court

concluded that there might be confusion on the part of the jury regarding separate conspiracies primarily as a result of Smith's counsel's exception. In an effort to avoid confusion on the part of the jury, the Court gave the new instruction on the issue of multiple conspiracies. Since Smith was not prejudiced in any way by our giving the new instruction, his request for a judgment of acquittal or for a new trial on this basis will be denied. In short, this issue about a defective charge on single and multiple conspiracies is, in my opinion, a cured Clupea harengus.

IV. The Court's Charge Regarding Termination of the Conspiracy.

Smith argues that our refusal to give an instruction that the mail fraud objective of the alleged conspiracy ended June 22, 1984 and that the travel act objective of the conspiracy terminated with the last act of travel, June 7, 1984 entitles Smith to a new trial. Smith contends that ". . . it was error to allow the jury to find that the defendants participated in conspiratorial conduct after the principal object of conspiracy had terminated by the final mailing or act in furtherance of interstate travel." Smith's post-trial brief at unnumbered page 20. Smith relies on the case of United States vs. Oxman, 740 F.2d 1298, 1304 (3d Cir. 1984) to support his argument. In *Oxman* the Court held that a conspiracy to violate a substantive prohibition in a federal statute ends when the unlawful object has been accomplished. The conspiracy charged in the *Oxman* indictment ended in June of 1979. The Defendant in that case requested an instruction charging that the jury must have found that the Defendant's membership in the conspiracy terminated before June of 1979. The Court in *Oxman* refused the requested instruction and gave a charge stating that the overt act must have occurred between November, 1976 and January 1981. In *Oxman*, the charge thus permitted the jury

to find an overt act beyond the termination date of the conspiracy set forth in the indictment.

The facts of United States vs. Oxman are significantly different from the facts in this case. The indictment in United States vs. Smith alleges that the conspiracy began on or about January 1, 1983 and continued up to the date of the indictment which was October 22, 1984. The indictment in United States vs. Smith alleges continuing offenses which contemplate continual uses of the mails and facilities of interstate commerce up to the date of the indictment, whereas the *Oxman* case dealt with a conspiracy which had ended on a fixed date.

The charge proposed by Smith (Smith's supplemental point No. 2) was not given because it was not applicable to the facts of this case. A Court may properly refuse to submit to the jury a requested instruction which incorrectly states the law applicable to the case or would mislead the jury, United States vs. Alvarez, 519 F.2d 1036 (3d Cir. 1975), or which presents a theory not supported by the trial record, United States vs. Bertucci, 333 F.2d 292 (3d Cir. 1964). The indictment did not charge that the mail fraud objective of the alleged conspiracy ended on June 22, 1984 or that the travel act objective of the conspiracy ended on June 7, 1984; thus, Smith was not prejudiced by this Court's refusal to give his proposed supplemental instruction No. 2. This Court properly instructed the jury that

> A conspiracy ends when its principal objective is accomplished, when it is abandoned, or when otherwise terminated by some affirmative act. Any agreement to conceal a completed crime made after a crime is committed does not—let me emphasize—does not extend the life of a conspiracy.

> Therefore, I charge you that in the absence of an express initial agreement to conceal between the conspirators, you may not find a Defendant guilty of a conspiracy from the mere fact that he agreed to conceal a completed crime or engaged in acts of concealment following the completion of the crime.
>
> Now, that's a bit difficult and it's vital and I'm going to read it to you again. (The Court then repeats the instruction.)

Transcript, Volume 40, p. 152. Smith's argument for a judgment of acquittal or for a new trial on the basis that we improperly instructed the jury regarding termination of a conspiracy is without merit.

V. Sufficiency of the Evidence on the Substantive Counts.

The substantive counts of which Smith was found guilty are three mail fraud counts (Counts 2, 3, 7) and five counts of committing interstate transportation in aid of racketeering (Counts 9, 12, 13, 14, 15). Smith argues that there is insufficient evidence to support the guilty verdicts on these counts.

a. The Mail Fraud Counts.

Count 2 of the indictment charges that Smith and other Defendants caused a letter to be sent from John Torquato to Defendant Smith in which Torquato describes a job on the Pennsylvania Municipal Retirement Board which David Herbert wished Smith and Torquato to obtain for him. Herbert was the State Director of Social Security for Public Employees and was

the highest state official in Pennsylvania empowered to authorize FICA refunds. The testimony of Torquato, Herbert and Kincaid indicated that Herbert was assisting CTA in obtaining FICA recovery contracts because Smith and Torquato had promised to obtain a better state job for him. The letter which is the subject of Count 2 of the indictment was clearly in furtherance of the conspiracy to influence public officials.

Count 3 of the indictment charges that Smith and other Defendants caused Janice Kincaid to send a letter to Smith containing a check for $1,000 on March 7, 1984 payable to the Republican State Committee of Pennsylvania. The evidence shows that the check was sent at the request of Smith to influence the awarding of the FICA recovery contract to CTA relating to the Pennsylvania school districts. Torquato testified that he had directed Kincaid to make the contribution from her own personal account at Smith's suggestion. Torquato later reimbursed Kincaid under the guise of a bonus. The jury could reasonably have found and we are persuaded that the mailing of this check was in furtherance of the conspiracy to influence public officials of which Smith was a participant.

Count 7 of the indictment charges that on June 22, 1984, Smith and other Defendants caused a letter to be sent from Torquato to Joseph Oravitz, Executive Director of the Pennsylvania School Board's Association, enclosing a draft of an opinion from the Chief Counsel to the Treasurer of the Commonwealth. The opinion indicated that CTA had an exclusive contract to recover overpaid FICA funds on behalf of all Commonwealth school entities. The evidence showed that Oravitz was the individual who would have notified the School Boards of the Commonwealth of the fact that CTA had been declared the exclusive FICA recovery agent for all Commonwealth School

entities. The fact that this mailing occurred after the contract had been obtained from the Treasurer does not take the mailing beyond the scope of the scheme charged in the indictment as Smith argues. The scheme charged in the indictment had not terminated at the time the letter was sent. Further, the money to pay the bribes promised to the Treasurer of the Commonwealth had not been collected and was at least in part dependent on future FICA recoveries.

b. The Travel Act Counts.

Smith argues that Count 9 of the indictment which charges the use of facilities of interstate commerce by Torquato to send a letter to Defendant Smith on December 16, 1983, is not proved because the record does not show any "overt act thereafter" in furtherance of the travel. 18 U.S.C. § 1952 states that

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—. . .
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in sub-paragraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

Most of the overt acts listed in the indictment relating to the

state contract for FICA recovery on behalf of the school entities occurred after the mailing of the letter on December 16, 1983. Torquato enclosed with the letter a $10,000 check for Smith's work on the Allegheny County contract and in the letter gave Smith advice concerning the best way to influence David Herbert. There was more than sufficient evidence for the guilty verdict on Count 9.

Smith argues that the discrete instances of interstate travel by Torquato in violation of 18 U.S.C. § 1952 were not proven because no subsequent overt act was shown to have occurred in relationship to the travel involved in Counts 9, 12, 13, 14, and 15. Smith again raises the argument that this case involved several separate conspiracies and that Smith did not participate in the conspiracy involving Allegheny County. As we held earlier in this opinion, the evidence showed beyond a reasonable doubt the existence of one conspiracy corruptly to influence public officials to award FICA recovery contracts to CTA. Smith was involved in the entire conspiracy not only through his own acts but also through his knowledge of the activities of other participants and acts done knowingly in furtherance of the unlawful goal. It is not necessary that Smith have known all of his co-conspirators or that he have taken part in each and every activity of the conspiracy in order for him to have been convicted of involvement in the conspiracy. United States vs. Grassi, 616 F.2d 1295, 1303 (5th Cir. 1980), *cert. denied,* 449 U.S. 956 (1981). The essence of the crime of conspiracy is the agreement to commit an unlawful act or acts, United States vs. Hutto, 256 U.S. 524, 528 (1921), United States vs. Klein, 515 F.2d 751, 753 (3d Cir. 1975). The Government has met its burden of proving that Smith entered into an agreement with the specific intent to advance the unlawful goal of attaining for CTA FICA recovery contracts through bribery and fraud.

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VI. The *Inadi* issue; Testimony of John R. Torquato, Jr. Regarding Conversations with Egidio Cerulli.

During the trial Smith objected to the introduction of testimony of John Torquato concerning Torquato's conversations with Egidio Cerulli on the grounds that the testimony violated the Confrontation Clause of the Sixth Amendment. United States vs. Inadi, 748 F.2d 812 (3d Cir. 1984), *cert. granted*, ____ U.S. ____ (May 28, 1985). The Government believed that Torquato was permitted to testify as to what he heard Cerulli say and this Court permitted the testimony. Smith now argues that the admission of this testimony into evidence was prejudicial and requires the granting of a new trial.

This Court may grant a new trial to Smith "if required in the interest of justice." Rule 33 Fed.R.Crim.P. A motion for new trial should only be granted where the error at trial is prejudicial. United States vs. Smith, 520 F.2d 1245 (8th Cir. 1975). "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Rule 52 Fed.R.Crim.P.

During the trial Torquato testified that he had contacted and then met with Mr. Cerulli, an official in the Democratic Party, to discuss the contract for FICA recovery in Westmoreland County. Torquato testified that Cerulli said ". . . he (Cerulli) would appreciate it if we would contribute to the Democrats". Transcript, Volume 4, pp. 73-74.

Smith contends that this testimony of Torquato violates the requirements of the Confrontation Clause as expressed in United States vs. Inadi, 748 F.2d 821 (3d Cir. 1985), *cert. granted*, ____ U.S. ____ (May 28, 1985). In *Inadi*, the Court held that the Government must show, as foundation for admitting out-of-court

statements of a non-testifying co-conspirator under Fed.R.Ev.801(d)(2)(E), that the co-conspirator is unavailable to testify in order for the testimony to comply with the Sixth Amendment's Confrontation Clause. The Confrontration Clause grants the accused the right to be confronted with the witnesses against him. Pointer vs. Texas, 380 U.S. 400, 85 S.Ct. 1065 (1965). The holding in *Inadi* is based in part upon Ohio vs. Roberts, 448 U.S. 56, 63-65, 100 S.Ct. 2531, 2537-2539 (1980) in which the Supreme Court held that "In the usual case . . . the prosecution must either produce, on demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." 448 U.S. at 65, 100 S.Ct. at 2538.

The Government argues that Torquato's testimony regarding his conversations with Cerulli was not hearsay because it was not offered to prove the truth of any matters asserted by Cerulli, but only to show the fact that the conversation and solicitation occurred between Cerulli and Torquato. United States vs. Bohr, 581 F.2d 1294 (8th Cir. 1981). Rule 801(d)(2)(E) of the Federal Rules of Evidence provides that "A statement is not hearsay if— . . . The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." The fact that an out-of-court statement is not being offered to prove the truth of the matter asserted by the statement brings the statement outside of the definition of hearsay and also beyond the scope of the Confrontation Clause, i.e. if the statement of the out-of-court declarant was not being offered to prove the truth of the matter asserted by this statement, the admission of the statement into evidence would not violate the Confrontation Clause. Since Cerulli's comments were not offered for the truth of their contents, Cerulli's statements were not in violation of the Confrontation Clause as interpreted in Ohio vs. Roberts, 448 U.S. 56, 100 S.Ct.

2531 (1980), and United States vs. Inadi, 748 F.2d 812 (3d Cir. 1984).

Further, even if we were to find that the introduction of Torquato's testimony regarding Cerulli's statements was in violation of the Confrontation Clause, Smith would not be entitled to a new trial because he was not prejudiced in any way by the admission of this evidence. Smith had the opportunity to cross-examine Torquato concerning the statements of Cerulli. Further, the Defendants opposed the giving of a cautionary instruction that the evidence was being admitted solely for the purpose of showing the solicitation of political contributions by Cerulli and not for the truth of showing the involvement of other individuals named by Cerulli. Transcript, Volume 4, pp. 65-71. Most significantly, Torquato's testimony concerning Cerulli's statements was a relatively short and unimportant aspect of the Government's case; Cerulli said nothing about Smith's involvement in the scheme to bribe public officials; in fact, Smith's name was not mentioned by Cerulli at all. Transcript, Volume 4, pp. 72-74.

VII. Alcohol Treatment Records.

Smith contends that this Court's denial of his motions to order disclosure of records of John Torquato and Judy Ellis maintained by alcoholism treatment programs deprives him of his Sixth Amendment right of cross-examination. 42 U.S.C. § 290dd-3 protects the § 290dd-3 records of a patient involved in an alcoholism treatment program conducted, regulated, or assisted by a department or agency of the United States. Such records may only be disclosed under certain circumstances, including "if authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor." 42 U.S.C. § 290dd-3(b)(2)(C). According to this

statute and the regulations published at 42 C.F.R. § 2.61, the records can only be disclosed by a court order based upon a showing of good cause and a finding that the public interest and the need for disclosure outweigh the injury to the patient, to the physician-patient relationship, and to the treatment services. 42 U.S.C. § 290dd-3(b)(2)(C), 42 C.F.R. § 2.64(d). If other competent evidence or sources of information are available, the Court should ordinarily deny the application. 42 C.F.R. § 2.64(e).

During and after a hearing held on April 19, 1985, we weighed the factors indicated in the statute and regulations and determined that the Defendants had not shown good cause for disclosure of the records, and that the public interest and need for disclosure did not outweigh the injury to the patients, to the physician-patient relationship, and to the treatment services. *See* this Court's written Orders of April 24, 1985, Docket #144, and of May 14, 1985, Docket #159. Smith's opportunity to cross-examine Torquato and Ellis was not impaired by non-disclosure of the records. There was full evidence that Torquato was an alcoholic and he was subjected to extensive cross-examination regarding his use of alcohol. It is highly unlikely that anything in the records from the alcoholism treatment program could have provided any additional basis for attacking his credibility. *See* Bell vs. State, 385 So.2d 78 (Ala. Cr. App. 1980); United States vs. Graham, 548 F.2d 1302 (8th Cir. 1977). The same is true as to Ellis. Smith was not prejudiced by the denial of his motions for records and is not entitled to a new trial on this basis.

VIII. The Eleven-Person Jury.

Smith argues that he is entitled to a judgment of acquittal or new trial because his constitutional rights were violated when this Court permitted the return of a verdict by eleven jurors. The

trial in this case lasted for approximately three months. After the charge the remaining alternate was discharged. On the morning of the fourth day of jury deliberation, one of the jurors was involved in a serious automobile accident while en route to the courthouse and was hospitalized. The Court and counsel consulted with her physician by telephone and learned that it would be months before she could deliberate with her fellow jurors. Defense counsel refused to stipulate to a verdict of eleven jurors. After hearing argument by all counsel regarding the Court's options, we invoked Rule 23(b) of the Federal Rules of Criminal Procedure and permitted the verdict to be returned by the remaining 11 jurors.

Rule 23(b) provides that

> . . . if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

Rule 23(b) Fed.R.Crim.P. The Notes of Advisory Committee on Rules explain that the relevant amendment to Rule 23(b)

> addresses a situation which does not occur with great frequency but which, when it does occur, may present a most difficult issue concerning the fair and efficient administration of justice. This situation is that in which, after the jury has retired to consider its verdict and any alternate jurors have been discharged, one of the jurors is seriously incapacitated or otherwise found to be unable to continue service on the jury. The problem is acute when the trial has been a lengthy one and consequently the remedy of mistrial would

> necessitate a second expenditure of substantial prosecution, defense and court resources.

Notes of Advisory Committee on Rules. The event which arose in this case is precisely the type of situation for which Rule 23(b) was designed. We applied the Rule because of the enormous investment of time and energy in this case by the parties, the court, the jurors, and the public.

The Advisory Committee cites the case of Williams vs. Florida, 399 U.S. 78, 90 S.Ct. 1893 (1970) as authority for the pertinent amendment to Rule 23(b). The Court in *Williams vs. Florida* held that the Sixth Amendment right to a jury trial does not include a requirement that the jury consist of 12 persons. In *Williams*, the Court upheld Florida's refusal to impanel a jury of more than six persons as provided by Florida law and held that a jury of six did not violate the Defendant's Sixth Amendment rights as applied to the States through the Fourteenth Amendment. Having upheld a six-person jury, the Supreme Court would probably uphold the occasional use of an eleven-person jury pursuant to Rule 23(b) Fed.R.Crim.P. The Court in *Williams* opened the door to the amendment of Rule 23(b) Fed.R.Crim.P. in stating that

> We do not mean to intimate that legislatures can never have good reasons for concluding that the 12-man jury is preferable to the smaller jury, or that such conclusions—reflected in the provisions of most States and in our federal system—are in any sense unwise. Legislatures may well have their own views about the relative value of the larger and smaller juries, and may conclude that, wholly apart from the jury's primary function, it is

> desirable to spread the collective responsibility for the determination of guilt among the larger group . . . Our holding does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that would constitute a jury.

Williams vs. Florida, 399 U.S. 78 at 103.

Smith fails to cite persuasive authority for his contention that Rule 23(b) is unconstitutional. None of the Court of Appeals' opinions in this circuit cited by Smith addresses the issue at bar. In our view, Rule 23(b) Fed.R.Crim.P. is constitutional. Our reliance upon Rule 23(b) Fed.R.Crim.P. did not violate Smith's rights under the Sixth Amendment or under Article III, Section 2 of the United States Constitution.

IX. The Evidence of the Laventhol-Horvath Contract.

Smith argues that the admission of the evidence of the Laventhol-Horvath Contract was irrelevant and prejudicial; however, Smith does not address this argument in any post-trial brief. Laventhol-Horvath is a nationally known accounting firm. The evidence showed that it was willing to enter into a contract to perform the identical FICA recovery services for the Pennsylvania school entities at a substantially lower price than CTA under the contract actually awarded to CTA. This evidence bears on whether or not bribery was involved in the awarding of the contract to CTA; therefore, the evidence of the contract was relevant and properly admitted.

Appendix B

X. The Testimony of Carol Teufel and the Admissibility of Rebuttal Testimony.

Included in his list of reasons for acquittal and in the alternative for a new trial, Smith lists several items which he does not address in any brief. He contends that the testimony of Carol Teufel was irrelevant and prejudicial and that this Court erred in admitting as rebuttal the testimony of James P. Connor, Ralph Tobelman, David Cole, Carol Curry, Gary Seifert, Edward Allen, Kathleen Destralo, and Leo Morris. Since these contentions are not addressed in a brief we assume that Smith is no longer relying upon them as a basis for his post-trial motions. Additionally, we are of the view that such contentions are without merit.

The grounds listed by Smith in his post-trial motions viewed individually and in total do not form the basis for the entry of a judgment of acquittal or for awarding Smith a new trial. An appropriate order will be entered.

s/ Muir
MUIR, U.S. District Judge

DATED: October 17, 1985

Appendix B

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 84-00156-04

(Judge Muir)

UNITED STATES OF AMERICA

vs.

WILLIAM T. SMITH

ORDER

1. William T. Smith's motion for judgment of acquittal is denied.

2. William T. Smith's motion for a new trial is denied.

s/ Muir
MUIR, U.S. District Judge

DATED: October 17, 1985

MM:sr

APPENDIX C—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AFFIRMING JUDGMENT FILED APRIL 28, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-5532, 85-5702, 85-5714

UNITED STATES OF AMERICA

v.

SMITH, WILLIAM T., JR.

WILLIAM T. SMITH, Appellant in 85-5532 and 85-5714

UNITED STATES OF AMERICA

v.

STONEMAN, ALAN R.

Alan R. Stoneman, Appellant in 85-5702

On Appeal from the United States District Court for the Middle District of Pennsylvania - Scranton
(D.C. Criminal Nos. 84-00156-04, 84-00156-05)

Present: HUNTER and MANSMANN, *Circuit Judges,* and POLLAK, *District Judge**

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* Hon. Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix C

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel March 18, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered July 23, 1985, and October 18, 1985 as appealed by the defendant, William T. Smith, Jr., in appeal Nos. 85-5532 and 85-5714 and entered July 25, 1985 and October 18, 1985, as appealed by the defendant, Alan R. Stoneman, in appeal No. 85-5702, be, and the same are hereby affirmed.

ATTEST:

s/ Sally Mrvos
Clerk

April 28, 1986

APPENDIX D—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 23, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-5532, 85-5714

UNITED STATES OF AMERICA

v.

SMITH, WILLIAM T., JR.

Appellant

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*

The petition for rehearing filed by

APPELLANT

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ James Hunter

Judge

Dated: May 23, 1986

APPENDIX E—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT STAYING MANDATE TO JULY 22, 1986 FILED JUNE 16, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-5532 and 85-5714 Only

United States of America

vs.

William T. Smith, Jr., Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 22, 1986.

s/ James Hunter
Circuit Judge

Dated: June 16, 1986